



Family Justice Review

Response by Michael Robinson of The Custody Minefield – the UK's leading internet information provider on matters related to shared residence, leave to remove and relocation law.

1. **What does the family justice system mean to you? What should the purpose of the family justice system be? What should not be included in the family justice system?**

   When I hear family justice, I think of a failed system, beset by delays, and parents damaged by their experience of the courts. Judicial discretion is too wide, and when combined with loosely worded statute ends in inconsistent outcomes. Depression, anxiety and stress are exacerbated by uncertainty and a sense of powerlessness, especially when this is over a prolonged period. We see little evidence that science and research informs judicial opinions as to what best supports child welfare.

   Perhaps the most saddening statistic I've come across, aside from the number of children who lose contact with a parent, is the 35% of respondents to a survey who said they had contemplated suicide during family court proceedings.[1] Surely we can come up with a system of dispute resolution more humane than the one being reviewed?

   Social workers, CAFCASS and the legal system aren't trusted, and our system encourages parental conflict via an adversarial process. The judiciary, in their application of the Children Act 1989, went against Parliament's original intentions that shared residence should be the common outcome from private family law applications.[2] Any new reform will only be successful if there is more detailed judicial guidance, clearly defined statute and independent 'quality assurance' style monitoring.

   The family courts should make decisions based on evidence, in a timely fashion, mindful that delays go counter to a child's best interests. There is too much conflicting judge made law, and insufficient regard paid to statute, especially in the area of relocation related family law where the child's best interests come second to a rigid adherence to 40 year old precedent and the primary carer's wishes. Relocation should only be permitted where proven to be in a child's best interests. We recommend the further reading of our report 'Relocation: Child Welfare, Needs and Rights', supported by Sir Bob Geldof and published in December 2009.[3]

   Prior to its inception, there was an intention stated in both Houses of Parliament that The Children Act 1989 should do away with the concept of 'custody and access' and debates in both houses entertained shared parenting arrangements being commonplace after the inception of the Act.[4] In contrast to this, and we believe in contravention of Parliament's intentions, the President of the Family Court introduced her own interpretation in the

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1 The Equal Parenting Alliance and Families Need Fathers Family Law Survey [2007]

2 The House of Commons reference sheet 89/5.13 on the Children Bill (26 June 1989).

3 'Relocation: Child Welfare, Needs and Rights' – a report by The Custody Minefield (December 2009) available for download at www.relocationcampaign.co.uk.

4 Ibid 1 and Hansard Debate (19 December 1988, page 1217 to 1219).

    

1991 President's Directions stating '*shared residence orders should only be made in exceptional circumstances*.

What a Family Justice System should be

In our opinion family justice should be that... "in support of the family unit, and promoting a just means of dispute resolution." Family law should safeguard a child's wellbeing against the s.31(2)(a) threshold criteria of the Children Act, meaning that the state should only act beyond the safeguarding of the family unit and children's relationships where children are at risk of significant harm.

What happens when you get an outcome which you don't believe is right for your child? The Court of Appeal only allows challenge to decisions that are 'plainly wrong'. It robustly defends judicial discretion. A better system of law would allow appeals where a judgment couldn't be shown to be 'plainly right', or at least in a child's best interests.

Judicial discretion, and the wide range of possible outcomes from the exercise of individual discretion leads many to a belief that the choice of judge is as much a factor in outcome as the merits of a case.

2. **What should the role of the state be when dealing with family-related disputes that do not concern the protection of children or vulnerable adults? To what extent should the state fund this?**

The state should promote shared parenting. Research shows that children do better in life when subject to a shared parenting regime.[5] Compared with children in sole residence arrangements, they do better at school; they are less likely to go to prison; their careers are more likely to prosper; they suffer less mental health problems, both as children and as adults. Unless there are child protection concerns, the state should not be recommending sole residence arrangements. There should be a rebuttal presumption of shared care following parental separation.

We feel it useful to include a definition of shared parenting in the context of family life and agree with the definition by the charity Families Need Fathers:

In practice shared parenting means:

- both parents being involved in routine as well as leisure activities;
- children sleeping, eating, doing school work and playing in each home with the support of both parents;
- the parents sharing the important decisions concerning the children's lives;
- each parent being involved in the children's schooling, sport, music and other activities;
- each parent being fully aware of and involved in securing and promoting the physical, intellectual and emotional health of their children;
- children being part of two extended families including maintained relationships with grandparents, uncles and aunts, cousins, friends.

The state's intervention should be the minimum required to protect a child's health and their and the parents' right to family life in accordance with the Human Rights Act and

[5] As set out in 'Relocation: Child Welfare, Needs and Rights' – a report by The Custody Minefield (December 2009) available for download at www.relocationcampaign.co.uk.

    

the UN Convention on the Rights of the Child. State intervention should be the minimum required to safeguard a child's relationships unless the threshold criteria of significant harm is reached.

We believe that the family unit, and family relationships are the cornerstones of a civilised and healthy society. It is not possible to force parents to stay in a relationship, but the state can support and enable continued family life thereafter.

The Cost to Society and Children of severed family relationships

Research shows that children are more likely to have mental health problems (40% more likely) when their relationship with their father is diminished or severed.[6] Similarly, research shows children more likely to be involved in crime and to experience teenage pregnancy when lacking a father in their lives.[7] We know that father involvement in schooling and education matters improves outcomes for children.[8]

Sole residence, the historically preferred outcome of the courts, is not in society's or children's best interests (unless there is a risk of significant harm posed by one or other parent). It is in society's best interests for there to be a state funded means of parental dispute resolution. Legal fees are disproportionate to many parents' financial means and the high cost of court proceedings leads to poverty.

Budgetary and Financial considerations

Who should pay for proceedings? We have already seen the impact of increasing the fees paid by local authorities for applications for care proceedings. The increase in public law application fees from £175 to £4,825 led to a 20% fall in applications until the case of Baby P. Children were put at risk due to budgetary considerations, and we are concerned that private law should remain financially accessible. We believe that attempts to recover the full costs of proceedings from parents will backfire, be harmful to children, and more costly to society in the medium to long term.

We do however see a number of areas where reform can achieve significant financial savings, without impacting in the quality of service provided (or indeed improving it). These are detailed further on within our answers to your questions.

Attainment of Parental Responsibility

Biological parents should not have parental responsibility conferred by the state. If parentage is in dispute, a DNA test is sufficient to confirm biological parentage. A child's birth certificate or a marriage certificate should otherwise be evidence of parental responsibility, irrespective of whether the child was born before or after 1st December 2003. Parental Responsibility Orders should not be necessary for biological parents.

Contact and Residence

We recommend the abolition of the definitions 'residence and contact' and that orders related to these matters be referred to as parenting arrangements orders in future. It is

[6] 'A Good Childhood: Searching for Values in a Competitive Age'. Richard Layard and Judy Dunn. The Children's Society (2009)

[7] Child Custody, Access and Parental Responsibility: The Search for a Just and Equitable Standard. Erik Kruk M.S.W. Ph.D. The University of British Columbia. December 2008.

[8] 'The Impact of Parental Involvement on Children's Education'. The Department for Education and Skills [2003]. 'Early father's and mother's involvement and child's later educational outcomes'. British Journal of Educational Psychology 2004; 74: 141-53.

    

our experience that many court battles are due to parents fearing exclusion from their children's lives.

We further believe that the granting of sole residence to one parent and contact to the other leads to some parents using the children to punish their ex-partner. In the words of Mr Justice Mostyn QC from a case in June 2010:

> *There is very good reason why such orders (shared residence) should be normative for they avoid the psychological baggage of right, power and control that attends a sole residence order, which was the one of the reasons that we were ridden of the notions of custody and care and control by the **Act** of 1989.*[9]

Aside from agreeing parenting arrangements, private family law proceedings should otherwise be restricted to assisting in the resolution of disputes concerning the exercise of parental responsibility.

We believe that court proceedings are often extended due to the parents fighting over who will be the resident parent. In reality, all residence (as opposed to being named a 'contact' parenting) confers is the right to take the child abroad on holiday for up to one month, and this could be included within parental responsibility. In terms of legal rights and responsibilities, 'residence' in itself is fairly meaningless. It is the quality of parenting time that matters. Arrangements for the children are important, not legal classifications which we believe have led to and exacerbated disputes. We believe that court time could be significantly reduced by removing the parents' fear that they will play a diminished role in their children's lives, and by there being 'less to fight over' and opportunity to abuse our legal system and the children themselves by using them as a weapon to punish an ex-partner.

Parenting Arrangement Plan

At the outset of proceedings, or mediation, we recommend that each parent complete a Parenting Arrangement Plan, setting out the time the children should be in their care and with the other parent, and detailing how the child's existing relationships, schooling and extra-curricular activities will be maintained. This plan, or negotiating starting point, should be detailed, including proposals for collection and drop off from school, holiday times, and arrangements for 'special days' such as birthdays, religious holidays etc. Focussing on the child's life may assist parents in producing child focussed arrangements. We further recommend that information be included within the Parenting Arrangement Plan document setting out the harm children experience from parental conflict and when deprived of both parents' care.

CAFCASS

CAFCASS's role in private family law proceedings should be greatly reduced and limited to the recording of children's wishes and feelings and facilitating the working of Family Assistance Orders. There should be no investigation into children's lives unless there is an identified risk of significant harm whereupon the case should be heard under public law. The reporting should then be done according to the more robust standards as set out in the Department of Health's 'Framework for the Assessment of Children in Need and their Families' [2000], as is commonly applied in public family law matters. We recommend abolishing s.7 reporting entirely. The quality of many s.7 reports is poor, as found by

[9] AR (A Child: Relocation) [2010] EWCA Civ 915

    

Ofsted inspections, and the time taken to write a report (up to 40 weeks) is entirely unacceptable in what are often relatively simple cases. The timescale for a s.47 and Core Assessment is 35 days, and we believe this a more adequate timescale and one more likely uphold a child's best interests.

We believe it makes sense to merge CAFCASS and Social Services, and direct savings in infrastructure and management costs to front line services and training. We believe consideration should also be given to there being a national authority established in preference to the existing structure whereby Children's Services are subject to local authority control. Neither service has a good reputation under the existing structures.

Wishes and Feelings

A judge may wish to consider a more mature child's wishes and feelings, but we believe that both parents should be asked by the presiding judge whether they wish to place the children in the invidious position of being asked to choose between their parents or be caught up in the parents' dispute. Where necessary, a social worker could be directed to see the children in the neutral setting of school, and record their wishes using one of the standardised and established methodologies. We cannot see a reason for the timescale for this being greater than 7 days, rather than the 40 weeks sometimes seen for section 7 reporting by CAFCASS.

The social worker should not go beyond recording what the child says, and leave interpretation, if required, to a suitably qualified child psychologist. Ofsted have criticised CAFCASS reporters for expressing opinions outside of their area of knowledge and expertise. CAFCASS and Social Workers should not comment on medical matters or psychological matters.

Rights of Audience and Litigants in Person

If parents are to continue to be represented in private law, we believe they should have the right to choose who assists them in court, and not be restricted to the high expense of having a solicitor or barrister speak on their behalf. We wish to see the repeal of s.12-s.19 and schedule 3 of the Legal Services Act 2007 so parents are free to choose who assists them. We believe that the litigant in person faces a significant disadvantage when the other party is represented. We do not believe that the courts properly understand how difficult it is to do such things as cross-examine your ex-partner yourself. The parent and not the state should decide whether or not a McKenzie Friend has rights of audience.

We believe that the President's new directions on McKenzie Friends go against Article 6 and Article 3 of the Human Rights Act. We believe it demeaning and discriminatory for a litigant to be made to argue in court that they are inarticulate. We believe that this requirement by the President represents degrading treatment, especially for a parent suffering stress and anxiety, or with a specific learning difficulty.

Breaches of parenting time orders

If there are no serious issues which have led to the breakdown of the child/parent relationship, the parent in breach should be ordered to attend and pay for parenting classes to assist in their exercising parental control. Similarly, both parents should share the cost of family therapy where required. It often astounds us that the courts accept 'I can't make Johnny see his Dad', whereas the courts would not accept 'I can't make Johnny go to school'. In an intact family, children at times 'fall out' with one parent. The measures set out in the Children and Adoption Act 2006 should be used. There should be

    

the desire for co-parenting, even after separation, and parents should be clear as to their moral responsibilities in this regard, and the financial implications of failing (if the impact on their children of failure is not a sufficiently motivating factor in itself).

There needs to be a deterrent for making false and malicious allegations.

Parental Alienation / Implacable Hostility and Sanctions

In the event serious allegations are made, these should be heard in public law, if the threshold criteria of significant harm is indicated by the allegation. We believe that such cases should be publicly funded, but there must be some form of sanction should the courts rule that allegations made by one or other of the parents are malicious or groundless. Jail is not a sanction we support. Fines will be dependent on parents' financial means, so we recommend the use of community service orders in the event that one or both parents have made vexatious applications and made false allegations intended to sever the child's relationships. We see such selfish actions to be another form of child abuse and emotional neglect.

Inspection

We recommend there be independent monitoring of judicial decisions and case management by Ofsted. We appreciate this will be not be a popular suggestion, and may require constitutional change. Child welfare and justice can only be served by consistent and just outcomes. We do not see how an independent body monitoring judicial outcomes and decision making compromises the independence of the judiciary and we believe a public report should be provided annually to the Lord Chancellor, Lord Chief Justice and President of the Family Courts. We also believe this report should be made public.

Ofsted already undertake the inspection of CAFCASS and Children's Services. We believe that our current, failed, inefficient and inconsistent system of family justice has continued unchecked due to a lack of robust independent monitoring and quality assurance and complaint mechanisms.

Revisions to the Children Act 1989

We believe that the welfare checklist within the Children Act 1989 needs greater definition. As stated by Lord Kilbraken in a House of Lords debate in 1988, the judiciary do not read Hansard reports, and it is left to them to interpret the wording of statutory instruments without being informed of underlying Parliamentary intent.[10] His concern that the Children Act would be misinterpreted proved to be prophetic, and the reassurances of the then Lord Chancellor have been shown to be groundless.

The March 2010 Washington Declaration on Family Relocation brought together experts from 50 countries who considered factors which we believe are relevant to all family disputes and their determination. We repeat below the considerations which they, and we, consider to be pertinent, but have amended these to make them applicable to all cases rather than those which only involve child relocation. In any judgment, the judiciary should consider:

[10] Hansard Debate (19 December 1988, page 1217 to 1219).

    

i) the right of the child to maintain personal relations and direct contact with both parents on a regular basis and in a manner consistent with the child's development, except if the contact is contrary to the child's best interest (upon the threshold criteria of significant harm);
ii) the wishes and needs of the child having regard to the child's age and maturity;
iii) the parties' proposals for the practical arrangements, including accommodation, schooling and employment;
iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the application to the court;
v) any history of family violence or abuse, whether physical or psychological;
vi) the history of the family and particularly the continuity and quality of past and current care and parenting arrangements;
vii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
viii) the nature of the inter-parental relationship and the commitment of the parties to support and facilitate the relationship between the child and their immediate and extended family;
ix) whether the parties' proposals are realistic;
x) in the event of an application to relocate, whether this can be proven to be in the child's best interests, the enforceability of contact provisions ordered as a condition of relocation in the State of destination, and the practicalities and financial burden of travel;
xi) issues of mobility for family members; and
xii) any other circumstances deemed to be relevant by the judge, but which shall not outweigh other matters set out by Parliament within these provisions.

Internal Relocation and Leave to Remove

We have grave concerns about the guidance by way of legal precedent in leave to remove and internal relocation cases and the subsequent harm being caused to children in these cases. The court's current guidance goes counter to the paramountcy principle enshrined in the Children Act, and attempts at appeal and a review of the 'binding precedent' by the Supreme Court has been prevented by the Court of Appeal. We believe that child relocation should only be allowed by the court if relocation can be shown to be in a child's best interests rather than the primary carer's.

We believe that legislation is necessary to afford greater protection to child welfare in this area (as per the statement made in EDM373 in 2009).[11] The courts fail to pay sufficient regard to academic research which highlights the likelihood of harm which children experience when separated from a parent.[12] The courts current ideology is flawed. We recommend the amendment to s.1(3) of the Children Act as set out above. We shall be publishing a new and updated parliamentary briefing report on this area of law in November 2010.

Given that we now know that relocation does present a risk of harm to the child in terms of their psychological, emotional and educational development, we believe such cases should include expert evidence. Welfare reports should be done under the more

[11] Early Day Motion 373 was tabled by David Maclean MP, and had cross party support from 58 Members of Parliament.
[12] As evidenced by The Parliamentary Briefing Report 'Child Welfare, Needs and Rights' published by The Custody Minefield and supported by Families Need Fathers (December 2009)

    

stringent criteria of the Framework for the Assessment of Children in Need and their Families, and social workers should be informed as to the research set out in our December 2009 report.[13]

The threshold criteria for grant of relocation applications should satisfy the test that the move is clearly in a child's best interests (beyond reasonable doubt).

We believe that any relocation which interferes with the child's relationships and schooling should be subject to judicial determination where parents are unable to agree to the move. With regard to internal relocation cases, and to help ensure that matters are agreed and considered prior to the relocation (rather than the children being moved as a fait a complis) we propose an amendment to the Education Act 1996, in that a child's school may not be changed, and a child may not be registered with a new school within the jurisdiction unless both parents sign an agreement to that effect which must be presented to both the LEA and school prior to re-registration. The only exception to this should be where a court has made a specific issue order relating to schooling, if there is a prohibited steps order limiting one parent's responsibility in this regard, or if one parent has died. This would further assist in paternal involvement in schooling and matters related to their children's education.

Revision to s.54 of the Access to Justice Act 1999

We believe that s.54 of the Access to Justice Act 1999 needs to be repealed, as this prohibits the citizen's ability to approach the Supreme Court for a review of precedent established by the Court of Appeal. The CoA currently has a veto on the review and progression of law by way of refusing permission to appeal. S.45 of the Access to Justice Act 1999 inhibits the proper development of law. This has led to a review of guidance for international family relocation cases ('leave to remove') being delayed and indeed blocked, despite considerable national and international criticism of the lower court's binding precedent.

Contact Centres

The use of supervised contact within a contact centre is often ordered based on the unchallenged allegation of one party. The child may find its relationship caught in an unnatural setting for many months due to long delays between proceedings.

In 2008, the Chief Executive of NYAS admitted that 75% of users of their contact centre users went on to have unsupervised contact. We believe that the majority of referrals come from malicious allegations. The implication on the child of a parent being deemed to be unsafe, or a risk, where there is no evidence to support this perpetuates a different form of harm to the child. One of unnecessarily being led to believe their parent may be unsafe.

Child safety must come first, but the system is open to abuse (at tax payers' expense) when there is no sanction for false allegations. We know of cases where solicitors suggest a contact centre simply because mum is anxious at being apart from her children. Contact centres should be used where there is a real risk of harm, or where serious neglect or abuse is alleged, and then investigations into allegations must be prompt and detailed.

[13] Ibid 11

    

A child being led to believe that their parent is unsafe, without reason, causes unnecessary harm and impacts on the child's sense of security.

3. **How effectively does the current family justice system meet the needs of its users?**
It does not. CAFCASS is not fit for purpose (our experience and Ofsted's findings upon repeated inspection). The courts are beset by delay, and there is inadequate time to consider evidence often leading to flawed judgments. The legal system is divisive, confusing and inconsistent in its outcomes. There is too little time afforded to the judiciary to consider evidence, and judgments often are based on how the parent acts in court.

There is little understanding of the pressures of court proceedings on litigants, and that how a parent behaves in court may bear no relation to how they would otherwise be in day-to-day life were their relationship with their child not at risk. Judgments are made based on their reactions to the breakdown of their spousal relationship, the unfamiliar settings of court, bewilderment at unfamiliar processes and confusing language. Then we subject parents to an adversarial process which encourages allegations and where outcomes are uncertain.

The expense of going to court is damaging to children and their parents. Funds that should promote the welfare of children are wasted on protracted legal battles.

- Accusations against the other parent are too often taken at face value, without proper investigation. Allegations need to be investigated, but we would wish to see serious allegations heard within public rather than private family law, and subject to s.47 and Core Assessment and the guidance set out in the Framework for the Assessment of Children in Need and their Families.

- Appeal against a judgment will in general terms only be allowed due to a failure in process or where the judgment is 'plainly wrong', yet the decision at trial is based on a 'balance of probabilities', and this is further contradicted by statute which sets out that the court must make judgments in the best interests of children. The three thresholds are significantly out of kilter allowing no redress for poor decisions.

- The measures brought in to assist in enforcing contact orders have mostly remained unused. The reasons given are a lack of Government funding. The attachment of warning notices to pre-existing contact orders should not be subject to judicial discretion (according to guidance), but is.

We propose a rebuttal presumption of shared parenting, within a parenting arrangement order. We believe that a parenting arrangement which is other than shared represents the states' unreasonable interference in family life unless there is risk of significant harm. We believe that such unreasonable interference goes counter to Article 8 of the Human Rights Act.

a. Does it have the capacity to deal with all cases comprehensively?

The family justice system is broken. It does not have the systems or capacity in place to deal with cases comprehensively.

    

Due to the lack of judicial continuity, cases are often not handled thoroughly and expeditiously.

b. How could capacity in the system be increased?

- Reduce Cafcass's role in private family law, and indeed merge this service in with Social Services to increase capacity where it is most needed (protecting the most vulnerable children).

- Introduce independent inspection of the judiciary. A failed system highlights the need for quality assurance style inspection, whereby processes, case management and the outcomes of proceedings can be examined in practice, reviewed and improved. A review of family law, once every generation is too little, too late.

- Have the attachment of warning notices be as intended, an administrative matter and not subject to judicial discretion.

- Have parental responsibility be conferred by way of evidence of biological parentage. A court may still need to order DNA testing for fathers whose children were born before 1st December 2003 and who were not married to the mother.

- Judicial continuity would prevent evidence having to be reheard as yet another judge takes over a case. There needs to be better diary management.

- Limit judicial holidays. Is it necessary for judges of a certain level to start work later in the day because of their 'rank', or for judges at appeal to have a three month summer recess?

- Savings from legal aid should be used to fund improved services to separating parents. The social returns would be significant, if this is well managed.

c. How efficient is the system?

The system is crippled with delays and plagued with unnecessary costs explained elsewhere in this document. Prolonged litigation often engenders extreme bitterness between parents which prevents constructive negotiations and inhibits the development of post separation co-parenting. The most extensive research into post separation outcomes for children finds that parental hostility increases under sole residence arrangements, and decreases when care is shared.[14]

The family justice system does not explain what it expects from litigants in the family courts. This has been addressed by the Midland Region of Family Judges and Magistrates, which published 'What the Family Courts expect from Parents[15]' but needs to be rolled out nationally.

[14] Child Adjustment in Joint-Custody versus Sole-Custody Arrangement: A Meta Analytic Review. Robert Bauserman, Journal of Family Psychology 2002; 16: 91-102

[15] HM Courts Services, 2009. *What the Family Courts Expect from Parents*. [online] London. Available at: www.hmcourts-service.gov.uk/cms/files/family_final.pdf [Accessed 18 August 2010]

    

d. Does the system ensure equality and diversity?

No. The lack of a shared parenting presumption in law means that currently the system does not treat both parents as equally important to their children, despite our now knowing from independent research that child welfare is best safeguarded by both parents' involvement in day to day care.

In the matter of child relocation, we believe the primary carer's right to freedom of movement in practice outweighs the child's, other parent's, and extended family's right to family life. Family life is not maintained by occasional visits or holiday contact, but meaningful involvement in the child's day to day life.

We believe that litigants in person with specific learning difficulties, such as dyslexia and dyspraxia are not adequately served by the court at all, and for some of our members, their specific learning difficulty and inability to cope with court paperwork and case management has led to all contact with their children being lost. We do not believe that there should be disadvantage caused by disability. Such litigants should receive legal aid or have the automatic right to a litigation friend of their choice (with rights of audience) if they produce a letter from a GP or expert confirming their disability.

Where one parent qualifies for legal aid, and the other does not but cannot afford the high cost of legal representation, there is no equality in arms. We believe that the cost of appeal is beyond the financial means of many, and parents are routinely warned by the legal profession that if costs are awarded against them, appeal could cost them tens of thousands of points. Access to justice is, sadly, dependent on ones savings or ability to borrow.

4. Are there areas within the current system where we could adopt a more inquisitorial approach, whereby the court actively investigates the facts of the case as opposed to an adversarial system where the role of the court is primarily that of an adjudicator between each side? What are the options, and advantages and disadvantages, for:

a. private disputes

b. Public matters

Yes, we favour a more inquisitorial approach in dispute resolution. Adversarial systems of dispute resolution promote allegation and counter-allegation, and cause lasting division between parents.

We do however fear that without independent inspection of judicial outcomes AND more clearly defined statutory guidance, a more inquisitorial approach may not achieve better outcomes for children, and indeed, could see worse outcomes. It is human nature that a judge, and anyone else, has preconceived notions of family life based on their own experiences. Many have lost faith in the judiciary. Greater, unfettered judicial powers without checks and balances are not a solution in and of themselves.

    

5. **How far are users able to understand the processes and navigate the family justice system themselves?**

   Poorly. We see an industry made from an overly complex system. We believe that due to a lack of detailed statutory guidance, ever changing common law makes our system overly complex. This is problem is compounded by the wide ambit of judicial discretion. On average, 7000 parents a month visit our website seeking legal information. We can only advise so far, as too much is dependent on individual judicial discretion.

   Remove confusing terminology (as done in contract law). How can a litigant in person understand rules of 'judicial notice', or 'stare decisis', or the rules on matters which are 'per incuriam'? The law is unnecessarily inaccessible and exclusive.

   a. **Are there clear signposts throughout the system?**

      No. A prime example being the attachment of warning notices upon a C78 application. The guidance notes say this is not a matter for judicial discretion, leading many to believe that the attachment of a warning notice should be an administrative exercise. In practice, we see such applications leading to the immediate rehearing of the principle of contact despite the courts already having ruled on the matter.

   b. **Do users know how and where to access accurate and timely information and advice? Is it readily available?**

      Yes, but only via the third sector. Our site will have had 80,000 visits in 2010. Information is either too simplistic or written for the legal profession. There is little in between which is why we believe so many parents visit our site and our content is continually being added to.

   c. **What are the options to support/enable people to resolve these issues without recourse to legal processes?**

      A system where outcomes are more certain from the outset. It is uncertainty and lack of applied sanctions for contact breaches which lead to many disputes, and the common knowledge that the courts rarely apply sanctions for non-compliance.

6. **How best can we provide greater contact rights to non-resident parents and grandparents?**

   Do away with the concept of residence and contact, and replace with parenting time orders and a regime of shared parenting after parental separation. Also, see our proposed revisions to s.1(3) of the Children Act. Make used of the reforms in the Children and Adoption Act 2006. We believe the majority of contact breakdown between grandparents and children come about due to there being insufficient enforcement of paternal contact orders. Similarly, grandparent / child relationships are often the casualty of relocation applications, where health and finances prevent long distance travel.

7. **How effective is alternative dispute resolution (ADR), such as mediation, collaborative law and family group conferencing? What types/models of ADR are more effective and for which circumstances? Does this differ according to cases? How could we improve it and incentivise its use and what safeguards need to be put in place?**

    

Such outcomes are only successful if parties engage, and where the outcome is more certain from the outset. Bring in a presumption of shared parenting, and mediation is more likely to be effective. While laudable, we doubt that funds are available (from parents or the state) to cover the cost of these services.

8. **To what extent do issues around enforceability of court orders motivate decisions to go to court? To what extent does it affect decisions within and outcomes of cases?**

   Contact enforcement measures are rarely applied, and again, there is no consistency. In our experience, this stops many from applying for enforcement. Similarly, we believe the lack of enforcement encourages parties to break contact orders.

   On the subject of parental international child abduction, it has been our experience that the Hague Convention is of limited worth, and the UK/Pakistan Protocol has been described by one senior member of the Pakistan legal profession as not worth the paper it is written on. The UK/Pakistan protocol is not recognised under Islamic Law. Too little is done by the state to secure the return of British children, unlawfully abducted to foreign countries. We believe that there are more than 500 such abductions a year.

   Contact orders, made when applications for leave to remove to a foreign jurisdiction are granted, are of limited worth. Enforcement will depend on a parent's financial means, and in relocation to non Hague Countries (and some Hague Convention countries), there is little to no prospect of re-establishing contact if the relocating parent does not adhere to the UK order. The basis for making such orders is 'cross your fingers and hope'. Hardly robust.

9. **Are there elements of cases which could be considered outside of a court setting and if so by whom? For what type of cases would this be appropriate and what sort of settings might be suitable alternatives?**

   What are the benefits and disadvantages?

   For contact breaches, warning notices should be applied on application without a judicial hearing (as per guidance). Parental responsibility should be conferred by biological parentage (not by the state). There should be a rebuttal presumption of shared parenting. Clearer outcomes would, we believe, lead to 'less to fight over', with the result being fewer applications to court.

   Parental education courses, mediation and high-conflict parent courses are laudable alternatives to court, but dependent on affordability and parental engagement.

10. **Would adding a triage stage, whereby cases are assessed as to the appropriate course of action, make the system more efficient; i.e. by speeding processes up, ensuring resource could be allocated appropriately etc? In what areas might this be appropriate?**

    Yes. A first hearing to determine whether mediation is suitable, whether the matter can be properly investigated and determined in a private law setting, or whether allegations warrant more detailed investigation according to public law criteria.

11. **Do you think the family justice system is well organised and managed? What are the strengths and weaknesses of the current governance and management structures?**

    

Who should take responsibility for the decision-making process? Who should be responsible for the administrative running of the system?

No. The family justice system is not fit for purpose.

We do not believe that family and social policy should be determined by the courts or family justice councils, but that these institutions are there to implement the will of Parliament according to our democratic process.

12. What systems issues are there? Eg. how could things like IT, filing and administrative processes be improved?

Applications should be submitted online. Case paperwork should be stored digitally (in a common pdf format). Both solicitor and parties (if unrepresented) should be able to submit evidence electronically, and have access to case paperwork online (albeit with password protection). Photocopying costs can be prohibitive for some litigants in person. Where the parties do not have access to a PC, this function should be done by the court administration department (scanning documents etc). Too often, audio tapes of proceedings get damaged or lost. Hearings should be digitally recorded, with backups of recordings stored separately.

13. Who should take ownership of cases when they are in the family justice system? Who is the case manager? And at which point do and should they relinquish responsibility?

The management of cases should be done centrally within the court. A judge should be designated to hear the case. We too often hear of cases where paperwork never reaches the judge, or they do not read it. An email acknowledging receipt of paperwork should be sent out within 24 hours of receipt of documentation. If paperwork is filed online, an email receipt could be sent out automatically.

14. How can we ensure that there is sufficient and appropriate accountability throughout the system?

There have been regular changes in family law since 1989, but this is the first time since then that in-depth review has been undertaken. The system needs constant review, and we recommend this be done by Ofsted, reporting annually to a multi-disciplinary panel including the Minister of State for Justice, Children's Minister, President of the Family Division, and representatives from leading charities.

We recommend that the President's Guidance to the Courts be reviewed annually at this meeting, and be subject to Ministerial oversight and consultation prior to publication.

We have reservations about the press being allowed to report solely on judgments. We accept the restriction that the parties should remain anonymous, but believe that unless full proceedings are heard and the press have access to the court bundle, accurate reporting is impossible.

15. How well do different organisations/partners in the family justice system communicate, share information and work together to resolve cases?

It is haphazard. Paperwork gets lost, instructions do not get sent out. We know cases where Social Services have lost psychological reports, the court has failed to send

    

directions to CAFCASS, so reporting was never done (in an international relocation case), and similar. A system for recording conversations (minutes) and digital receipt acknowledgment of documents enabling an audit trail would assist in better case management. Electronic case management may be a cost effective and more reliable solution.

16. How clear are the different roles and responsibilities of those who are involved in the family justice system (such as the judiciary, legal practitioners, social workers, Cafcass officers, expert witnesses, administrators, IROs, court staff)? Are all these roles necessary? How effectively are these roles fulfilled?

CAFCASS and the judiciary express opinions on medical matters, despite having no experience in this area. CAFCASS Reporters have received criticism from Ofsted for this. Where psychological matters are factors in a case, these should be subject to expert rather than lay opinion.

In international family law, and specifically leave to remove cases, the courts decided in 2005 that a parent need provide no evidence to prove that their level of distress caused by a refusal of their application would be so profound as to prevent their ability to provide adequate care for their child. Due to this single matter, most leave to remove cases are allowed. Cases should be primarily based on evidence, and the judiciary and CAFCASS limited to their areas of expertise. Where psychological matters support an argument, these need expert investigation. Judges are not psychologists.

17. Where do you think there is scope to make efficiency savings within the family justice system?

Abolish legal aid in private family law. Merge CAFCASS with a national social work department (removing social work from local authority control but within a structure similar to the police service). Remove labour intensive paper based evidence, and submit and store evidence electronically whereby the judge, experts, parents and their counsel can access the information online (subject to a secure system).

Provide far more detailed judicial guidance, and monitor performance. How can there be efficiency and confidence without independent monitoring and assessment? There can't which is why our much criticised system of family law has broken down, is costly, inefficient and fails families and children. Society picks up the financial and social cost.

We see no need for cases to be held in court rooms, and believe a judge's chambers are a more suitable venue. We often see parents sat in huge court rooms normally used for criminal trials, which seems an appalling waste of money (and is unnecessarily intimidating for the parties). As for setting, all that is needed is a large table and a few chairs.

18. What improvements to funding arrangements and mechanisms could be made?

Remove the penalty of costs being awarded. The court can make s.91(14) orders to limit vexatious applications, and we would prefer to see the use of community service orders if an application is clearly vexatious. Abolish legal aid for private family law applications.

Fees policy under the last Government was based on the policy that family court 'services' should move towards charging at full economic cost. This led to a 20% drop in

    

care proceedings until the death of Baby P. The state must bear the lions share of costs for family law, since society bears the costs when things go wrong. The policy to recover full costs from litigants should be reviewed, and will be subject to challenge if implemented, on Human Rights grounds and specifically Article 6.

19. Please tell us about your role in the family justice system. What value does this add to the family justice system?

My website, The Custody Minefield (www.thecustodyminefield.com), is the most visited on the internet on shared residence, leave to remove, internal relocation and contact enforcement. We aim to inform parents, and make family law and child welfare related research accessible to all.

My first book on family law was endorsed by the Magistrates Association Magazine who recommended it to any separating parent, and it was further endorsed by the Divisional Chair of the British Association for Counselling and Psychotherapy It reached no.2 in Amazon's Divorce Category.

My family law reform proposals regarding international family law, leave to remove and internal relocation cases have the support of the organisation Families Need Fathers, the Find Savanah-Jade Campaign (and their 25,000 members), Grandparents As Parents, Grandparents Apart, Jewish Unity for Multiple Parenting, and the Equal Parenting Alliance. Sir Bob Geldof wrote the forward to my Parliamentary Briefing Report on this area of law which can be found at www.relocationcampaign.co.uk.

The value to the family justice system is helping parents and the wider family be informed as to family law, while basing information on the most contemporary child welfare related research findings. We aim to inform and assist, and also provide information to researchers for mainstream broadsheet newspapers and the television media.

20. What qualifications and experience should be required for the different roles of those who work in the family justice system? What should be included in initial training and continuous professional development?

We shall answer this question to correspond with the roles in our proposed path.

Judiciary
Dispute resolution. Family Law. We find too many judges do not keep up to date with developments in common law and can be surprisingly ignorant of statute. We see confusion as to when the no-order principle applies, when shared residence orders can be made, and judgments being made, even in the Royal Courts of Justice, which are 'per incuriam'.

The legal profession
Dispute resolution. We would also wish to see solicitors and barristers sign up to a new code of conduct including a commitment to dispute resolution. This should include encouraging parents to access mediation. We would also recommend that it is incumbent on the solicitor to discuss the document 'What the Family Courts Expect from Parents'

    

with their clients and to similarly take notice of that guidance.[16] We were saddened by the Legal Services Commission 2007 report which found that only a third of legal aid solicitors made their clients aware that mediation was an option.

Psychologists

We believe that where the court requires psychological opinion, only an accredited forensic psychologist with expertise in family work should undertake this function on behalf of the court. We see too many occasions where a psychotherapist or counsellor is accepted as an expert, when they are not! A register of experts should be kept by HMCS in co-operation with the British Psychological Society, and the quality of reporting should be subject to oversight by Ofsted in conjunction with the British Psychological Society. Where experts fail to provide reports to the expected standard, they should be struck off the register. We also believe that experts and social workers should not have anonymity in proceedings.

Providers of parenting courses

This work should be carried out by properly trained and accredited family therapists, and we recommend discussions with the British Association for Counselling and Psychotherapy regarding accreditation and training of their members.

Mediators

Mediators need conflict resolution skills, and we believe that mediators should also have training in family therapy.

Cafcass/ Cafcass guardians / National Youth Advocacy Service *(*NYAS*)*

Under our proposals they will have a different set of responsibilities, and limited to reporting in public family law, acting as a guardian in such cases, and only providing assistance in private law where the court makes a Family Assistance Order or to record children's wishes. Where reporting, they should be limited to recording observations and not making recommendations as it is for the court to find fact. Oversight and inspection should be by Ofsted. CAFCASS could be abolished, and this service undertaken by Social Services.

21. Are there sufficient performance management and feedback mechanisms throughout the system as a whole?

None that are effective. If you disagree with case management or judicial decisions, your only option is to appeal. In our experience, the Office for Judicial Complaint are not fit for purpose. Their remit should have included investigating complaints about poor judicial decision making and case management. If you disagree with how a social worker has carried out their reporting and investigative function during proceedings, you are told this must be put to the judge. Your concerns may get a footnote in a judgment, but rarely.

Due to this, much of the problems within our family justice system are not investigated and remain hidden. We would prefer to see Ofsted in charge of complaints concerning case management, social services/Cafcass's conduct and practices, and outcomes from

[16] HM Courts Services, 2009. *What the Family Courts Expect from Parents*. [online] London. Available at: http://www.hmcourts-service.gov.uk/cms/files/family_final.pdf [Accessed 18 August 2010]

    

proceedings. We have faith in Ofsted to perform that role. We see no reason why members of the legal profession could not be appointed to work within Cafcass to consider complaints regarding judicial decisions. If upheld, the complaint could then be forwarded to the office of the Lord Chief Justice for further determination under s.19 of the Judicial Discipline (Prescribed Procedures) Regulations 2006.

22. How could the system be improved to ensure it meets the needs of users and secures positive outcomes for children?

We propose the abolition of the Office for Judicial Complaint, local authority complaints stages in respect of Children's Services, CAFCASS's complaint's processes, and the Office of Local Government Ombudsman in respect of Children's Services, and that these roles and functions be streamlined and undertaken by Ofsted. Only a single body can effectively manage quality assurance and complaints in relation to court proceedings and children's matters. We believe that where a complaint is upheld, there should be an automatic right to a permission to appeal hearing irrespective of time limits. Where complaints are upheld, the state should bear the cost of appeal and have the power to remove judges from office (an address to both Houses of Parliament is unnecessarily restrictive).

While we understand the constitutional protections afforded to judiciary in criminal and civil law, we see no reason for such independence for those who consider family matters.

We would like to see Ofsted investigations result in analytical reports on each court, so that regional inconsistencies are highlighted and corrected. The Family Justice Councils should not be influencing local family policy.

23. How can we ensure sufficient protection is afforded to vulnerable adults through the system?

For adults who have learning difficulties, mental health problems or other such vulnerabilities, the courts fail to grant sufficient allowances and assistance. The setting, language and protocols are often inappropriate and can lead to violation of Article 6 of the Human Rights Act. We recommend that Melanie Jameson be asked to write a guide for parents with communication related disabilities, and a complete review be undertaken of the court process to ensure those with disabilities have access to justice.[17]

Litigants-in-Person should have the automatic right to a McKenzie Friend with rights of audience, if THEY and not the JUDGE decide it necessary. The President of the Family Court's current guidance sets out that the parent must convince the judge that they are inarticulate, and we believe this to be demeaning and an infringement of their human rights and dignity.

We believe the court experience would be less traumatic if ALL proceedings and hearings (contested or otherwise) were held in chambers around a table rather than, in some cases, being heard in a formal court (which in some courts is the same setting as used for criminal trials). This would free up court rooms for more complex or criminal cases.

[17] Melanie Jameson is the author of 'Good Practice in Courts and Tribunals – Information Sheet on Specific Learning Difficulties'.

    

The court should be mindful of the research showing that a third of parents going through the family courts contemplate suicide. Most parents are vulnerable when their relationships break down.

24. In what types of cases is it important to hear the voice of the child to assist with decision making? How should the child's voice be heard in the family justice system?

While children's wishes and feelings are of great importance, we are concerned that these are not always viewed in conjunction with the child's needs.

As an example: a reason given for broken contact was that the child didn't wish to see their paternal grandparents. Upon investigation, it transpired that the child wished to play on its XBOX, and going to Grannies was boring in comparison. The CAFCASS Officer said that the child was old enough (at 11) to make up their own mind.

I suggested the parent ask the CAFCASS Officer, on the stand, whether it would be acceptable for a child of 11 to decide not to go to school, and whether the resident parent, by acceding to their child's whim, was failing to exercise parental control.

For society and the child, it is important that children learn that we cannot always do what we wish to, and that relationships go through their ups and downs. Rights go together with responsibilities, and this is an important lesson for children to learn. Children have a right to have their wishes heard, but it remains for adults to make decisions, and the Court and CAFCASS have leant too far in one direction.

There are other cases where the courts have gone too far the other way. In international leave to remove cases, I have come across too many where the children state they do not wish to emigrate, leave their other parent, friends, extended family and school, but their wishes are outranked by the wish of the relocating parent.

Common sense is required, but not always present. There needs to be better guidance, as set out in our proposed revision to the Welfare Checklist.

25. How effective are Cafcass and CAFCASS Cymru? What should their role and remit be in the future?

Cafcass are not fit for purpose, criticised by Ofsted, parents and the courts. We believe that this service could be abolished completely, and this work undertaken by Children's Services. That said, we believe social work practice in the UK needs general reform, better management, and more structured systems and processes for child protection.

In terms of reporting, and as mentioned in Ofsted inspection reports, CAFCASS should not be venturing opinion, but should limit their reporting to factual matters.

26. What has guided your response to the questions posed above, e.g. personal experience, feedback from the public, specific research or evidence?

More parents speak to me about relocation cases than perhaps any other. My website is the highest ranked on the internet, and I take many referrals from charities. Until this month, I have been a moderator of the self-help forums of the charity Families Need Fathers for the past 4 years, spoken at conferences run by the Grandparents Association

    

and Families Need Fathers, and work with many McKenzie Friends (lay advisors), assisting in the presentation of arguments etc.

My report into Relocation and Family Law was endorsed by Sir Bob Geldof in 2009. Currently, some 7,000 parents a month visit my website. Many also contact me directly. Most of the parents visiting my website are looking for information on shared residence. In most cases, they want information on shared parenting.

I wish to see better outcomes for children. I have assisted in hundreds of cases and am fully up-to-date with contemporary research findings concerning child welfare and post separation outcomes.

27. What can be learned from the way in which other sectors work which could be transferred to the family justice system?

Ofsted inspections on Children's Services and CAFCASS should be extended to include members of the judiciary. I appreciate that constitutional reform may be required to allow this, but believe such oversight to be essential to ensure justice is not only seen to be done, but done in the first place. How else can we ensure we have an efficient, child centered and effective system of family justice unless there is independent and external monitoring where each individual judge has a 'wide ambit of discretion'.

28. Do you know of any good and innovative practice in the UK that the Review Panel should consider? What wider services could be tapped into (especially in the children's sector) to support the family justice system?

Midland Region Family Justice Experience: In 2009 The Midland Region of Family Judges and Magistrates under the leadership of Mr Justice McFarlane developed a document entitled 'What the Family Courts expect from Parents'. We would like to see this rolled out nationally. [18]

29. Is there anything we can learn from international examples?

It should be noted that there was a presumption of shared parenting in the three countries which topped UNICEF's report into child happiness in the industrialised world, while the UK came bottom. We do not believe this to be a coincidence.[19]

With regard to the handling of relocation cases (leave to remove and internal relocations), we endorse the March 2010 Washington Declaration on International Family Relocation, and firmly believe this should replace the much criticised common law and binding guidance from the case Payne v Payne.[20] Every day this reform is delayed, and especially in relocation related family law, more children are harmed by judicial outcomes rather than having their well being protected.

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[18] Ibid 6
[19] UNICEF Report Card 7: An Overview of Child Wellbeing in Rich Countries (2007)
[20] Payne v Payne [2001] EWCA Civ 166